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In The

Supreme Court of the United States

October Term, 1996

JERRY BELLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

*WILLIAM BARNETT, JR.
135 South LaSalle Avenue
Suite 3600
Chicago, IL 60609
(312) 726-4480
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

(1) After *Gaudin v United States,* 115 S. Ct. 2310 (1995), will a trial court be excused from its duty to instruct criminal fraud jurors on Materiality, simply because the jury were instructed on the separate element of intent?

(2) After *Sullivan v Louisiana,* 508 U.S. 275 (1993), is it possible to find harmless error in a verdict when the trial court had refused a defendant's request that a jury be instructed on a separate element of the crime?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 94 F. 3d 330 (7th Cir. 1996) and is set out in Appendix hereto, pp. 1a-16a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 19, 1996, and is set out in Appendix hereto, pp. 17a-18a, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The case involves the Fifth and Sixth Amendments to the Constitution of the United States.

2. The case also involved the following provisions of United States Code Annotated:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C. Annotated §1343.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered September 19, 1996, affirming petitioner's conviction and sentence of imprisonment.

Petitioner was convicted for violations of 18 U.S.C. §1343 (wire fraud) in the United States District Court for the Northern District of Illinois on the 13th day of March, 1995.

Petitioner had been indicted by the Grand Jury on October 22, 1993, for participating in a scheme to obtain money and property by false and fraudulent pretenses, representations and promises. (Indictment ¶2; Appendix, p. 20a *infra*). Petitioner asked the District Court to instruct the jury that they might find him guilty only if the pretenses, representations, or promises were *material*, but the District Court refused. Petitioner insisted that the false representations specified by the Grand Jury were totally immaterial to the proposed transaction, an attempt to obtain from Smith-Barney a margin loan on allegedly worthless "pink sheet" stock. For example, one of the specified false representations was a statement by a "loan

broker" that he had been very active in organizing, managing, funding and re-funding "insurance vehicles" (Indictment ¶11; Appendix, p. 22a; *infra*). This statement could not have been material to the proposed transaction, and (while false) was arguably meaningless because even the Government called it "gobbledygook" (Tr. 33).

The jury were instructed that they could convict petitioner if they found that any single one of the misrepresentations cited by the Grand Jury was false (including the broker's statement), but they were not told that the statement(s) chosen by them necessarily had to be pertinent to the proposed transaction. The jury found defendants guilty on March 13, 1995, and petitioner was sentenced to 18 months imprisonment on November 21, 1995. He filed a notice of appeal to the United States Court of Appeals on November 29, 1995. The court denied his appeal on August 22, 1995. The court denied defendants' motions to rehear the case en banc on September 19, 1996.

REASONS FOR GRANTING THE WRIT

Gaudin v United States, 115 S. Ct. 2310 (1995) established that Materiality is a factual element to be proved beyond reasonable doubt to a criminal fraud jury. Most federal courts have applied *Gaudin* in plenary fashion. *See, United States v David*, 83 F. 3d 638, 640-41 (4th Cir. 1996) (failure to instruct on Materiality plain error even in absence of request); *United States v Maguire*, 79 F. 3d 1396, 1403-04 (5th Cir. 1996); *United States v Di Rico*, 78 F. 3d

732, 736-67 (1st Cir. 1996) (failure to instruct on Materiality can never be harmless); *United States v Nash*, 6 F. 3d 504, 507-08 (9th Cir. 1995); *United States v Wells*, 63 F. 3d 745, 749-51 (8th Cir. 1995).

Two circuits have limited *Gaudin*, but only in a case (unlike the present one) where the defendant had not requested an instruction on Materiality, *United States v McGhee*, 87 F. 3d 184, 187 (6th Cir. 1996), and in a very rare case (also unlike the present one) where a statute actually specified that the requested information was material, rendering a false answer Material as a matter of law. *United States v Klausner*, 80 F. 3d 55, 60-61 (2d Cir. 1996). In this case, the allegedly fraudulent misrepresentations occurred during a purported business transaction, and the determination of just what elements of the negotiation were Material was one that was very much open to question.

No circuit has endorsed limitations on *Gaudin* as sweeping as those proposed in the Seventh Circuit's panel opinion below. The Seventh Circuit's panel opinion invites the United States to oppose defendants' requests for Materiality instructions in all cases of fraud, on the theory that this element is necessarily covered in instruction on "intent" (Panel Opinion; Appendix, p. 7a, *infra*). *Gaudin*, 115 S. Ct., at 2314-15, makes it clear that Materiality determinations require a jury not to investigate the speaker's criminal intent, but rather the probable effect of his words on the auditor, by assessing the inferences a reasonable decision-maker would draw from representations of fact, and the significance of those representations to him.

The panel opinion not only encourages the Government to oppose the mere giving of Materiality instructions, but also to argue before other circuits that such an error can be "harmless," a position squarely opposed by *Sullivan v Louisiana*, 508 U. S. 275 (1993). This court has strongly insisted on a defendant's right to contest every single element of a crime, and to require a jury finding on each such element beyond reasonable doubt. *See, Sandstrom v Montana*, 442 U. S. 510 (1979). A jury's failure to find materiality is a "structural defect" in the verdict of fraud, *see, Arizona v Fulminante*, 499 U. S. 279, 309 (1991) that defies harmless error analysis. Because the jury made no finding of Materiality (the Government persuaded the trial court that no such finding was necessary [Appendix, Instructions Conference, pp. 31a-35a, *infra*; Tr. 1417]), their verdict rested on incomplete findings, and hence they rendered no verdict at all. The trial and appellate bench are unempowered to supply that defect by implication.

Even if it were constitutional for the trial or appellate bench to find Materiality as a fact, it could not do so under the facts of this case. The Indictment charged defendants with a scheme to defraud by false and fraudulent misrepresentations [Indictment ¶2; Appendix, p. 20a]. The Indictment then specified certain representations as having been fraudulently made, most of which had nothing to do with the value of the stock that was going to be transferred on margin to Smith Barney, and therefore had no "pecuniary significance" to the transaction.[1] As we have shown, one of the allegedly fraudulent

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[1] The Model Penal Code decides the Materiality of fraudulent representation in terms of whether it has "pecuniary

misrepresentations was the boastful claim of a loan broker acting for the payee that he was experienced in funding and refunding "insurance vehicles." A sophisticated financial enterprise like Smith-Barney, the "victim" in this sting case, would hardly regard this as an inducement to transact.

The jury were instructed that they could convict all the defendants if they found that *any one* of the misstatements specified in the Indictment (including the "insurance vehicles" boast) was false, *simpliciter*. [Appendix, Instructions of Court, pp. 36a-37a, *infra*]. In essence, the trial court passed on the Materiality of each of the specified misstatements, and charged the jury only to pass on their falsity. This error dwells in *Gaudin's* heartland.

(a) Materiality Is an Element of Mail and Wire Fraud

The panel opinion properly finds that Materiality is an element of wire fraud. (Panel Opinion; Appendix, p. 9a, *infra*). It is generally held that a scheme to defraud, punishable under the federal fraud statutes, must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. *United States v Pearlstein*, 576 F. 2d 531, 535 (3d Cir. 1978). *See also, United States v Van Dyke*, 605 F. 2d 220, 225 (6th Cir. 1979); *Gusow v United States*, 347 F. 2d 755 (10 Cir.), *cert. denied*, 382 U. S. 906 (1965); *United States v*

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significance," thus eliminating prosecutions based on braggadocio about a participant's fraternal associations, etc. Model Penal Code §220.3.

Baren, 305 F. 2d 527, 533 (2d Cir. 1962). Petitioner's requested instruction on Materiality specified that the representations alleged to be false must be reasonably calculated to deceive persons of ordinary prudence. [Appendix, Instructions Conference, pp. 31a-35a, *infra*].

The panel opinion breaks tr[illegible]bling new ground by holding that juries should not be instructed to find Materiality in the misstatements specified in the indictment, if otherwise they are instructed that the defendants have acted with the intent to deceive. This holding departs from long-standing demands that all essential ingredients of a crime be submitted on instructions to the jury. *Screws v United States*, 325 U. S. 91, 107 (1945).

It was the government's position below that Materiality was not an element of mail and wire fraud, a position the panel opinion rejected. (Panel Opinion, Appendix, p. 9a, *infra*). Indeed, a contrary position would allow the Government to prosecute persons for fraud simply for having made evanescent and collateral misrepresentations in a business transaction ("I'm a Mason, too!"). This would have the effect of making persons liable where they would not otherwise be chargeable under state fraud statutes, simply because they used the telephone or mailed a letter. Such a holding would greatly extend the scope of the federal fraud statutes, against the advice of *McNally v United States*, 483 U.S. 350, 359 (1987). The federal fraud statutes were designed to arraign those who would otherwise escape state prosecution because they used interstate means, not to indict behavior unregulated by the states, simply because a long-distance call was made. *Kann v United States*, 323 U.S. 88, 95 (1944).

(b) Materiality is Not Established Simply Because a Statement is Intentionally Deceitful.

The panel opinion short-circuits the rule in *Screws v United States, supra,* requiring that the jury be charged to make a finding on every essential element of an offense, by postulating that the jury found the misrepresentations to have been material because it decided that the defendants had knowingly uttered an untruth. This is a *non sequitur*. It is not sufficient to suggest that Materiality can be "argued" to the jury: the Law recognizes that arguments of counsel are no substitute for instructions by the court. *Taylor v Kentucky,* 436 U. S. 478, 488-89 (1978). *Gaudin* states that a decision on Materiality requires the jury to determine first, what was said, and then to determine what decision the auditor was trying to make. 115 S. Ct., at 2314. The Materiality inquiry is directed, then, not at the mind of the defendant, but the perception and motivation of the victim. No amount of lawyerly argument can direct a jury to consider an entirely new and separate inquiry.

Every crime requires an *actus reus* and a *mens rea. United States v Apfelbaum,* 445 U.S. 115, 131 (1980). To permit jury findings of *mens rea* necessarily to include a finding that a misstatement was "material" confuses these distinct elements of the completed offense. This court has been very jealous to assure that proof of criminal acts, *simpliciter,* not constitute proof of intent. *See, Patterson v New York,* 432 U.S. 197 (1977). This court should be equally jealous to assure that proof of intent not substitute freely for proof of acts.

(c) The trial court's decision not to instruct the jury on Materiality withdrew from their consideration the very heart of the defense.

The panel opinion, ironically, devotes the greatest part of its analysis to whether a crime could be said to have occurred. Expressing some doubt on the point, the panel reasoned that it was "possible" the scheme might have succeeded; thus, defendants could not be acquitted as a matter of law. [The trial court had puzzled whether the misrepresentations were so unbelievable as to constitute "a serious criminal attempt." (Tr. 1259)]

The best (and only objective) was of assaying the seriousness of an attempted fraud, is to determine whether a material misrepresentation was uttered – i.e., misrepresentations relevant to the decision the auditor is being asked to make. The irony in the panel opinion is that the question whether a "crime" occurred was effectively withdrawn from the jury's consideration. Because the Government persuaded the trial court not to instruct the jury that defendants' statements must be relevant to the transaction, the jury were permitted to find that the crime of fraud occurred on the basis of falsity alone.

Most of the misrepresentations specified in the Indictment were immaterial to the decision Smith-Barney was being asked to make: Robert Coffman's grandiose estimates of his personal wealth (Tr. 131) were totally irrelevant because he was never going to be personally liable for the loan. It is arguable whether the "insurance vehicles" comment previously referred to could be material to any transaction. The speaker described himself as a

loan broker and advised that he would draw a commission consisting of an unbelievable one-sixth of the proceeds. Because the speaker was never going to be asked to repay the loan, nothing he said could be material to any decision Smith-Barney might make.

In short, the jury were told that they could convict the defendants of fraud if they found any one of nine specific statements made by the defendants to have been false, including the loan broker's idle boast. The jury were not told that they must find that the statement was reasonably capable of influencing a decision. Thus, the question identified by the panel as central to the case – whether a crime was or even could be compounded from the elements supplied by the defendants – was taken from the jury and decided by the court.

The Seventh Circuit's panel's opinion encourages trial courts not to instruct on materiality at all, because it holds that materiality instructions are duplicative where the jury are instructed to find specific intent to deceive. Having encouraged the Government to contest *Gaudin* instructions in fraud cases as "unnecessary," the panel opinion permits the Government to argue that *Gaudin* violations are "harmless." This bacillus of error will infect defendants' right of trial by jury in cases beyond the limited context of fraud; but in cases of fraud, it will do its worst work by making the court, and not the jury, the only arbiter of the *actus reus* of the offense.[2]

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[2] A mailing or interstate telephone call is not the *actus reus* of fraud; it is merely a jurisdictional fact, *United States v Craig*, 573 F. 2d 455, 486 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). In fact, the contents of the call or mailing need not themselves

(d) A requirement of Materiality protects the public and is critical in "sting" cases because Materiality can never be presumed when no transaction is intended.

The panel opinion expresses a fear that if the Government were required to prove Materiality, the gullible would lose the Law's protection. In the instant case, that concern has no place: the transaction never succeeded precisely because the purported victim, Smith-Barney, one of the nation's most sophisticated financial houses, instantly detected the implausibility of what was offered. The Smith-Barney representative testified that the firm was determined "from the very first instant" that not one penny of its money would ever be drawn to defendants [Tr. 163].

The civil law recognizes that a misrepresentation can be material if the speaker knows that the auditor is peculiarly disposed to regard the statement as important, even though a reasonable man might not. Restatement, Second, Torts §538(2)(b). Context defines the "relevance" of a statement, assuring some minimum *actus reus*; if an *obiter* deceit is uttered to a sophisticated financial house, neither common law nor statute would hold such a remark to be criminal. If an extreme case is presented, the Government may ask that a Materiality instruction be given which particularly addresses it along the lines suggested by the Restatement of Torts, *supra*. There is nothing in the statutory language ("scheme to defraud . . . by false and fraudulent misrepresentations or promises . . . ") that

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be deceitful. *United States v Feinberg*, 535 F. 2d 1004 (7th Cir.), *cert. denied*, 429 U.S. 429 (1976).

prevents a trial court from instructing special cases in a deserving circumstance.

The Government, however, insists that the exceptional situation supply the standard of behavior for every case – even to the extent of eliminating an element of the offense entirely, a novel prescription that will damage the public far more than protect it. Because mail and wire fraud are predicate RICO offenses, 18 U.S.C. §1961, civil fraud plaintiffs will be encouraged to escape common law materiality demands by bringing their civil actions under RICO, instead of common law. This will destabilize commercial transactions, the security of which the Materiality element is designed to guarantee. *Prosser and Keeton on Torts*, 5th Ed. §108 p. 753 (1984).

Dispensing with Materiality is most unwise in "sting" cases like the present one. In real life, if a loss occurs, the loss itself is some evidence that a deception was material. "Stings" are not designed to sift for Materiality, they are designed to apprehend those who dissemble. Sting operators tape the proceedings, and choose at leisure "deceptions" that would pass the attention and therefore the memories of real life businessmen. This enables the Government to secure a plea of guilty from a peripheral participant whose deceptions were admitted gobbledygook. The "guilty" witness proves the Government's case against all the others because in its view, only one deception need be proved, and that deception itself need not be material. The Government's position is not only contrary to the "narrow construction" of wire fraud offenses mandated by *McNally v United States, supra*, 483 U.S. at 359, it is pregnant with abuse.

CONCLUSION

The court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit on the questions presented by this petition.

Respectfully Submitted,

*William Barnett, Jr.
135 South La Salle Avenue
Suite 3600
Chicago, IL 60609
(312) 726-4480
*Counsel of Record

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-3217, 95-3909 & 95-3995

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT COFFMAN, JERRY BELLER,
and THRESHER T. RIPPEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 CR 757 – **Wayne R. Andersen,** *Judge.*

ARGUED MAY 24, 1996 – DECIDED AUGUST 27, 1996

Before POSNER, *Chief Judge,* and ROVNER and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* The appellants, Beller, Coffman, and Rippey, along with two other persons, were convicted by a jury of six counts of wire fraud, in violation of 18 U.S.C. § 1343, and were sentenced to prison terms ranging from 13 to 18 months. The statute forbids the use of the telephone or other modes of transmission by wire for the purpose of executing a "scheme or artifice to defraud." (The mail-fraud statute, 18 U.S.C. § 1341, is

similar, except that the method of execution is the mail rather than transmission by wire.) Here is the scheme the government proved: On May 9, 1989, Stoller, one of the defendants who is not an appellant, placed an unsolicited phone call to Smith Barney's Chicago office. He told the broker who answered the call, McCausland by name, that he wanted to sell several million dollars of stock through Smith Barney, including restricted stock of the Firestone Development Company. McCausland smelled a rat. It is unusual for someone to want to sell millions of dollars of stock through whoever just happens to pick up the phone at a brokerage house with which the caller appears to have had no previous dealings. And restricted stock, which as the parties use the term (it bears a different meaning in securities law) is stock that cannot be sold until a future date stated on the stock certificate, is usually issued to corporate insiders, and Stoller had not indicated that he was one. McCausland reported his suspicions to his superiors, who called in the FBI, which designated an agent to pose as an employee of Smith Barney. The next day Stoller met with McCausland and represented himself as controlling a pool of assets that included $30 million worth of stock of FDC. FDC had been created by Beller in 1987. It had never had any value, but Beller had represented its value to be tens and at times hundreds of millions of dollars and had also misrepresented that a member of the Firestone tire family was the chairman of the board.

Stoller offered to put up $1 million in restricted stock of FDC as collateral for a loan of $300,000; the restriction would expire in about six weeks. He gave McCausland a sheaf of papers purporting to demonstrate the financial

solidity of the persons and firms involved in the transaction, including a fax to Stoller from defendant Coffman, dated March 7, 1989, representing FDC as having assets of $35 million, and phony balance sheets of Coffman, who was to be the borrower of the $300,000 (Stoller acting as the broker in exchange for a fee of $100,000), and of the firm on behalf of which Coffman was supposedly borrowing. According to these balance sheets, Coffman had a net worth of $76 million and his firm $266 million. In fact, neither he nor his firm had any assets.

McCausland and the FBI played along with this nonsense, and on May 22 he and the agent met with the defendants (all but Beller, who however participated in the meeting by telephone) purportedly to finalize the transaction. At the meeting Rippey said that FDC was active in the telecommunications, real estate, and convenience store markets; actually it was an empty shell. He also said that after the loan of the $300,000 was completed there would be another $30 million in FDC stock available for collateralizing future loans by Smith Barney. Coffman explained that the $300,000 loan would be the seed money for an ambitious project. All these were lies. When the time came to disburse the loan, the FBI broke up the meeting and arrested the defendants present; Beller was arrested later. The six counts of which the defendants were convicted were based on the March 7 fax from Coffman, other wire communications purporting to demonstrate the defendants' wealth, and Beller's telephonic participation in the May 22 meeting.

The appellants argue that the evidence was insufficient to convict them because their misrepresentations, which primarily involved grossly exaggerating their

wealth, could not have influenced Smith Barney in deciding whether to lend them the $300,000, and this for three reasons: 1. The wealth of the borrower is immaterial to a margin loan, that is, a loan collateralized by stock owned by the borrower. Smith Barney does not run a credit check on a margin borrower or require a loan application indicating the borrower's financial status. All it checks on is the value of the stock. 2. Margin loans cannot lawfully be made on restricted stock. 3. Smith Barney is a sophisticated business, and no sophisticated business would be taken in by the defendants' preposterous misrepresentations. A person worth $76 million does not pay a broker (Stoller) $100,000 to borrow $300,000.

None of these reasons holds water. 2 is simply false. No law or business custom forbids the making of margin loans collateralized by restricted stock. Of course, the restriction, by reducing the liquidity of the stock, reduces its value as collateral. Here, however, the borrower was seeking only a third of the purported value of the stock, and the restriction was due to expire in only six weeks. As for 1, the more affluent the borrower, and the greater the prospect of lucrative future business with the borrower and his associates, the less likely the lender is to conduct a searching investigation into the actual value of the stock tendered as collateral. Moreover, the misrepresentation of the value of FDC stock (it had no value) was clearly material to a decision whether to lend money on the security of it. As for point 3, the most substantial point and the one the defendants press hardest, if they intended to obtain money by lying about the collateral and their financial status and prospects, it is not a defense that the intended victim was too smart to be

taken in. McCausland was unusually alert. Had he not been, the scheme might have succeeded. But even if the prospects for success were as poor as the defendants argue – even if they were quite negligible – the defendants would not be off the hook.

The statute punishes the scheme (more precisely, the use of the telephone or cognate means of communication to conduct the scheme) rather than the completed fraud. E.g., *United States v. Richman*, 944 F.2d 323, 331 n. 9 (7th Cir. 1991). It punishes, in short, the attempt to defraud. *United States v. Utz*, 886 F.2d 1148, 1150 (9th Cir. 1989) (per curiam). Attempts are punished even when the chance of success is dim – even when the facts are such that, unbeknownst to the defendant, the attempt could not possibly succeed. *United States v. Cotts*, 14 F.3d 300, 307 (7th Cir. 1994); *United States v. Dominguez*, 992 F.2d 678, 682 (7th Cir. 1993). If it could not succeed because the completed act at which the defendant aimed is not criminal – as where a 13-year-old boy attempts to commit rape in a state in which you must be 14 to be charged with rape, *Foster v. Commonwealth*, 31 S.E. 503, 505 (Va. 1898) – then a defense of impossibility will lie; it is not a criminal attempt to try to do what the criminal law does not forbid you to do. But if the attempt is merely thwarted, and if completed in accordance with the defendant's understanding of the circumstances would have resulted in a crime, then the attempt is culpable even though it is certain that it would not have succeeded. *Cotts* – a case involving a conspiracy to kill a fictitious informant (of course not known to the defendant to be fictitious) – is a dramatic example of this principle, and the present case is well within its orbit. There may be attempts so feeble,

such as sticking a pin into a voodoo doll of your enemy in an effort to kill him, that the attempter is entitled to be acquitted, as a harmless fool. *Attorney General v. Sillem*, 2 H. & C. 431, 525-26, 159 Eng. Rep. 178, 221 (Exch. 1863); American Law Institute, *Model Penal Code* § 5.05(2) (1962). The defendants' scheme, though harebrained, was not that harebrained. Cf. *State v. Smith*, 621 A.2d 493, 505 (N.J. App. 1993).

It is true that many cases, including some in this court, say that a scheme to defraud is not within the reach of the mail- or wire-fraud statutes unless a reasonable person would be deceived by the defendants' misrepresentations. E.g., *Spiegel v. Continental Ill. Nat'l Bank*, 790 F.2d 638, 646 (7th Cir. 1986); *United States v. Brown*, 79 F.3d 1550, 1557-59 (11th Cir. 1996); *United States v. Brandon*, 17 F.3d 409, 425 (1st Cir. 1994). But it is hard to believe that this language is intended to be understood literally, for if it were it would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals and hence the people most needful of the law's protection – and most needful or not are within its protective scope. *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991); *United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980). "Taking advantage of the vulnerable is a leitmotif of fraud." *Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1347 (7th Cir. 1995). It would be very odd for the law to protect only those who, being able to protect themselves, do not need the law's protection. In fact picking on the vulnerable normally makes your conduct more rather than less culpable, earning you a heavier sentence. We applied this

principle to fraud in *United States v. Newman*, 965 F.2d 206, 211 (7th Cir. 1992).

Biesiadecki aligns us with those courts that hold that the mail- and wire-fraud statutes protect the gullible against frauds directed against them, yet *Spiegel* aligns us with those courts that define mail and wire fraud in terms of misrepresentations or omissions calculated to deceive a reasonable person. We doubt that there is real inconsistency. The "reasonable person" language has two purposes, neither of which has anything to do with declaring open season on the people most likely to be targets of fraud. The first is to guide the jury in evaluating circumstantial evidence of fraudulent intent: that the defendants' scheme was calculated to deceive a person of ordinary prudence is some evidence that it was intended to deceive. E.g., *Kenty v. Bank One, Columbus, N.A.*, 1996 WL 435269, at *3 (6th Cir. Aug. 5, 1996). Evidence that the scheme could fool only an idiot would not be evidence of such intent – would be, if anything, evidence against an inference of such intent – unless the scheme was aimed at an idiot. But if it were, this would make it a case of direct evidence of wrongful intent. The fact that a reasonable person would not have been deceived would be no more relevant than the fact that a murder victim would have survived had he been wearing a bulletproof vest.

Second, the "reasonable person" language gestures, although clumsily, toward the indistinct border zone between real fraud and sharp dealing. Almost all sellers engage in a certain amount of puffing; all buyers, even those who are rather gullible, know this; it would not do to criminalize business conduct that is customary rather than exceptional and is relatively harmless. The cases

carve a safe harbor for the type of misrepresentation that, being so commonplace as to be "normal," is not likely to fool anyone. *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991); *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989); *United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993). This is not such a case. Indeed, the defendants' argument is not that they were just puffing, but that their misrepresentations were so gross as to be unbelievable. They ask that the safe harbor for small lies be expanded to include the biggest whoppers. But there is a difference between lies so small that they are discounted in advance, as part of the language of business, and so are harmless, and lies so large that the sophisticated see through them. The latter lies are not normal. Most people who are worth nothing do not claim to a prospective lender to be worth $76 million. The extravagance of the lie may make it difficult to believe, but we saw earlier that a scheme to defraud is not excused by being unlikely to succeed.

The defendants also argue that the various communications on which the indictment is based were not in furtherance of the scheme to defraud. The communications concerned their wealth, and they say their wealth was irrelevant to the loan. It wasn't, as we have seen. And the fact that some of the communications were made before the defendants decided to call Smith Barney is irrelevant. A scheme to defraud can, and often does, begin before the victim is picked. E.g., *United States v. Morris*, 80 F.3d 1151, 1160 (7th Cir. 1996); *United States v. Boula*, 932 F.2d 651, 652 (7th Cir. 1991).

So the statute was violated. But the defendants argue that they should get a new trial because the jury wasn't instructed that their misrepresentations, to be culpable, had to be material. In so arguing they rely on the cases, notably *United States v. Gaudin*, 115 S. Ct. 2310 (1995), which hold that the defendant in a case charging a false statement (to a credit union, a bank, the Internal Revenue Service, a government procurement agency, and so on) is entitled to such an instruction. But the reason is that Congress did not intend to criminalize immaterial false statements even if willful. A person might lie about his age on a loan application not because he thought taking two years off his actual age would make him a better loan prospect but because he didn't want anyone to find out his true age (he might fear age discrimination by his employer, or have a young girlfriend). That is not the sort of lie that the false-statement statutes were intended to criminalize, because it does not endanger the lender.

No more did Congress want to classify immaterial lies as frauds for purpose of the mail- and wire-fraud statutes. But whereas the statutory term "false statement" contains no hint of materiality, so that the jury has to be instructed separately on that element, the term "fraud" embodies the concept of materiality. Fraud is a *material* misrepresentation or omission, in the sense of one relevant to the decision that the perpetrator of the fraud wants his intended victim to make. E.g., W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 108, p. 753 (5th ed. 1984). An instruction in the language of the statute adequately puts the issue before the jury and allows the defendant's lawyer to argue in his closing statement that there was no scheme to defraud because

the misrepresentation concerned a matter that was irrelevant to the decision of the purported victim to deal with the defendant. There is no objection to an instruction explaining the meaning of fraud to the jury, such as the instruction in 2 Edward J. Devitt, Charles B. Blackmar & Kevin F. O'Malley, *Federal Jury Practice and Instructions: Criminal* § 40.13, p. 521 (4th ed. 1990), but only the Ninth Circuit thinks such an instruction mandatory. *United States v. Halbert*, 640 F.2d 1000, 1007-08 (9th Cir. 1981). Even if the Ninth Circuit were right, the omission of the instruction here would be a harmless error (as it was in *Halbert*) in view of the overwhelming evidence of materiality.

In a case in which the defense was that the misrepresentation was mere puffery, however, the defendant would be entitled to an instruction putting this defense before the jury, provided of course that there was some evidence to support the defense. *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996). This could be described as a defense of immateriality – though alternatively as simply a denial that the defendant engaged in fraud. But that was not the defense here, as we have seen.

Coffman advances a second ground for a new trial. After deliberating for several hours, the jury sent a note to the judge stating, "We have been able to reach a verdict on defendants Beller and Rippey. We cannot reach a unanimous decision with respect to Mr. Coffman." Without reassembling the defendants and the lawyers, the judge told the court security officer to tell the jury to keep deliberating, and the officer told the jury to keep deliberating until the lawyers arrived. By the time the parties

and lawyers were reassembled in the courtroom, the jury had reached its verdict on Coffman: guilty.

The judge's response to the jury's note was erroneous, as the government concedes. The defendant is entitled to be present at all stages of his trial, Fed. R. Crim. P. 43(a), and a judge's response to a note from the jury is one of those stages. *Rogers v. United States*, 422 U.S. 35, 39 (1975); *United States v. Neff*, 10 F.3d 1321, 1324 (7th Cir. 1993). But the infringement of this right does not entitle the defendant to a new trial if it is unlikely to have affected the jury's verdict. *United States v. Patterson*, 23 F.3d 1239, 1255 (7th Cir. 1994). That is the case here. The jury had been deliberating for about ten hours when it announced its inability to make up its collective mind about Coffman. In such circumstances the trial judge would be expected to tell the jury to make another effort to arrive at a verdict. *Allen v. United States*, 164 U.S. 492, 501-02 (1896); *United States v. Kwiat*, 817 F.2d 440, 446 (7th Cir. 1987); *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (en banc). So if the judge had not responded to the note before reassembling the participants, the only difference this would have made would have been that the direction to the jury to keep deliberating would have been sent 20 minutes later.

The form of the direction would, no doubt, have been somewhat different, in line with the form approved in *Silvern*. The direction actually given was abrupt, peremptory, and the rapidity with which the jury responded by bringing in a verdict could be thought evidence that it felt coerced by the judge's instruction. *United States v. Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992); *United States v. Thomas*, 946 F.2d 73, 76 (8th Cir. 1991). Still, a bare instruction to

keep deliberating does not warrant reversal. *United States v. Kramer*, 955 F.2d 479, 489 (7th Cir. 1992); *United States v. D'Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986); *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985). As in those cases, so here, the note was noncommittal; it did not lean in favor of the prosecution; it did not ask the jurors to surrender their individual convictions in the interest of a prompt unanimous verdict. As for the 20-minute delay, had the jury been left in the dark for that amount of time or longer while the defendant and the lawyers were brought back into the courtroom, a subsequent instruction couched in the terms of *Silvern* would have been unlikely to have had any less effect on the jury's decision to bring its deliberations to a rapid close.

The final set of issues that has enough merit to warrant discussion concerns the amount of loss used in figuring the defendants' sentences under the sentencing guidelines. The guidelines direct the sentencing judge in fraud cases to use the "intended loss" rather than the actual loss if the former is greater. U.S.S.G. § 2F1.1, application note 7. So the judge figured the loss at $300,000, the amount that the defendants intended to obtain fraudulently from Smith Barney. The defendants argue that the interposition of the FBI before any money changed hands ensured that the actual loss would be zero and that in such a case the intended loss can be no greater. Their argument is that a loss that cannot possibly occur cannot be intended. The argument is inconsistent with application note 10 to section 2F1.1 of the guidelines, which by authorizing a downward departure "where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider

honoring it" implies that the unlikelihood of an actual loss does not affect the computation of the "intended loss." The argument also gives a twisted meaning to the word "intended" and would, if accepted, irrationally erase any distinction in the severity of punishment between a defendant who tries to defraud his victim of $1,000 and a defendant who tries to defraud his victim of $1,000,000.

We are mindful that several cases – *United States v. Galbraith*, 20 F.3d 1054, 1059 (10th Cir. 1994); *United States v. Santiago*, 977 F.2d 517, 524 (10th Cir. 1992), and *United States v. Khan*, 969 F.2d 218, 220 (6th Cir. 1992) – hold that the intended loss is indeed zero when, for example because the fraud is induced by a government sting operation, the loss would have been zero even if the scheme had not been interrupted. In effect these cases recognize impossibility as a mitigating factor in sentencing in circumstances where it would not mitigate guilt. That is not an incoherent position, yet it seems plain to us that the place for mitigation on the basis of a large discrepancy between intended and probable loss is, under the guidelines, in the decision whether to depart downward, rather than in the calculation of the intended loss. We know that frauds that have no chance of succeeding are nevertheless punishable, and it would be extremely odd, as well as contrary to the language of the guidelines, to treat all such frauds the same, as frauds involving an intended loss of zero, even if the magnitude of the intended loss differed vastly.

But even if this is wrong and the cases we cited were decided correctly, they would not carry the day for the defendants. They are cases where the fraud would have

done no harm even if the defendants had not been interrupted. Here the fraud had a real victim in its sights but was interrupted before it could do any harm. That makes this a clear case of attempted fraud, where the intended loss is the relevant benchmark rather than the actual loss, by definition zero because it was only an attempt. *United States v. Falcioni*, 45 F.3d 24, 26-27 (2d Cir. 1995). We add that because the sentence is to be based on the intended rather than the actual loss, the three-level downward adjustment for attempts, U.S.S.G. § 2X1.1(b)(1), is inapplicable, *United States v. Strozier*, 981 F.2d 281, 285-286 (7th Cir. 1992); *United States v. Yusufu*, 63 F.3d 505, 513-14 (7th Cir. 1995) – wholly apart from the inappropriateness of making such an adjustment when the substantive offense, mail or wire fraud, is a crime of attempting rather than attaining.

We agree with defendant Beller, however, that the judge should not have jacked up the intended loss to $457,000 by adding in, as conduct relevant to the offense of conviction, the amount for which Beller had bilked some purchasers of the worthless stock of FDC back in 1987. That fraud was related to the scheme to defraud Smith Barney in 1989 only in the use of FDC stock in both schemes. The use of the same instrument of crime on separate occasions involving different victims does not establish relevant conduct within the meaning of the guidelines, which define it as "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). There was no more a common scheme, or the same course of conduct, than if Beller had used the same gun to hold up two different people two years apart.

The purpose of the guideline on relevant conduct is to base a defendant's sentence on the most serious crime that he committed, as distinct from the crime of which he was convicted, up to the statutory maximum for a sentence for that crime. *United States v. Ritsema*, 31 F.3d 559, 564-65 (7th Cir. 1994); *United States v. Masters*, 978 F.2d 281, 284 (7th Cir. 1992). A defendant might commit arson in the course of which a person died, and be convicted of arson; he would be sentenced as if for murder, though of course his sentence could not exceed the statutory maximum for arson. *United States v. Martinez*, 16 F.3d 202 (7th Cir. 1994). This is not such a case. The scheme to obtain a loan collateralized by FDC stock began on or shortly before March 1989. The defrauding of investors in FDC was a separate scheme, carried out two years earlier. It was separate in time and involved different victims and a different method of employing FDC to defraud, namely by selling FDC stock rather than by borrowing against the security of the stock. That is only a small difference; the real point is that there were two schemes rather than one. See U.S.S.G. § 1B1.3, application note 9.

The error is harmless, though. The guidelines applicable to Beller's sentence do not distinguish between a $300,000 and a $457,000 loss. They are within the same zone, which runs from $200,001 to $500,000. U.S.S.G. § 2F1.1(b)(1)(H) (1987). The current guidelines do distinguish between them, U.S.S.G. §§ 2F1.1(b)(1)(I)-(J), but are inapplicable to these defendants. We do not think it reasonable to suppose that had the judge not classified Beller's other fraud as related conduct, he would have given him a lighter sentence within the guidelines range. For within that range the judge is free to consider any

factor bearing on the appropriate sentence, and Beller's previous fraud, however classified, was certainly such a factor.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 27, 1996

BEFORE: Honorable Richard A. Posner, Chief Judge

Honorable Ilana Diamond Rovner,
Circuit Judge

Honorable Diane P. Wood, Circuit Judge

Nos. 95-3217, 95-3909 and 95-3995

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROBERT COFFMAN, JERRY BELLER and
THRESHER T. RIPPEY,

Defendants-Appellants

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 93 CR 757, Wayne R. Andersen, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 19, 1996

Before

Hon. RICHARD A. POSNER, Chief Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

UNITED STATES OF AMERICA Plaintiff-Appellee, No. 95-3909 v. JERRY BELLER, Defendant-Appellant.	]]]]]]]]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 CR 757 Wayne R. Andersen, Judge.

ORDER

On September 10, 1996, defendant-appellant Jerry Beller filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. _____
v.	)	Violations: Title 18,
	)	United States
WILLIAM STOLLER, ROBERT COFFMAN, RICHARD LANSING, THRESHER "THOMAS" RIPPEY, and JERRY BELLER	)	Code,
	)	Sections 2, 1343
	)	and 1001
	)	

COUNT ONE

The SPECIAL APRIL 1993 GRAND JURY charges:

1. At all times material to the indictment:

a. Smith Barney was a nation-wide company with an office located at 3 First National Plaza, Chicago, Illinois.

b. Smith Barney offered its clientele various financial products and services such as maintaining stock portfolios and purchasing and selling securities.

c. Firestone Development Company, Inc. (hereinafter FDC) was a corporation organized and existing under the laws of the State of Nevada with its principal place of business located at 5005 LBJ Freeway, Dallas, Texas.

d. Defendant William Stoller portrayed himself as a financial "consultant/broker" for a company, Trans-Global Investors Funding, which was operated out of defendant William Stoller's personal residence, an apartment located at 1 E. Scott, Chicago, Illinois.

e. Defendant Robert Coffman portrayed himself as a financial lender operating a company called Support Financial Services, Inc. which was incorporated on May 19, 1989 in the state of Oklahoma and which was operated out of defendant Robert Coffman's personal residence located at 535 Rebecca Lane, Ada, Oklahoma.

f. Defendant Richard Lansing portrayed himself as a financial "broker" from Dallas, Texas.

g. Defendant Thresher "Thomas" Rippey was president of FDC.

h. Defendant Jerry Beller portrayed himself as a "business consultant" d/b/a RCB Associates which was operated out of 5005 LBJ Freeway, Dallas, Texas.

2. Beginning no later than March 7, 1989, and continuing until November 15, 1989, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, devised, intended to devise and participated in a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, knowing said pretenses and promises would be false when made, which scheme is further described in the following paragraphs.

3. It was part of the scheme that between May 9, 1989 and May 22, 1989, defendant William Stoller contacted representatives of Smith Barney and discussed placing 100,000 shares of FDC stock as collateral at Smith Barney in order to obtain a loan of $300,000.

4. It was part of the scheme that defendant William Stoller falsely described himself as a multi-millionaire to a representative of Smith Barney.

5. It was part of the scheme that defendant Williams [sic] Stoller stated to a representative of Smith Barney that the 100,000 shares of FDC were worth $1,000,000 when, in fact, the stock was virtually worthless.

6. It was part of the scheme that defendant Williams [sic] Stoller stated to a representative of Smith Barney that he was acting as a broker who wanted to obtain the $300,000 loan on behalf of Robert Coffman, d/b/a Support Financial Services.

7. It was part of the scheme that, in a financial affidavit tendered to a representative of Smith Barney by William Stoller, defendant Robert Coffman falsely described himself as having a personal net worth $76 million dollars.

8. It was part of the scheme that defendant Williams [sic] Stoller was to receive $100,000 from the $300,00 loan proceeds from defendant Robert Coffman for his efforts in procuring the loan.

9. It was part of the scheme that defendant Richard Lansing represented himself to Smith Barney as a "broker" who had introduced defendant Robert Coffman to defendant William Stoller.

10. It was part of the scheme that defendant Richard Lansing was to receive $50,000 from defendant William Stoller as compensation for introducing defendant William Stoller to defendant Robert Coffman.

11. It was part of the scheme that defendant Richard Lansing falsely stated to a representative of Smith Barney that he was very active in the organizing, managing, funding and re-funding of "insurance vehicles."

12. It was part of the scheme that defendant Jerry Beller agreed to allow defendant Robert Coffman to use a stock certificate in his possession representing 100,000 shares of FDC as collateral for the loan at Smith Barney.

13. It was part of the scheme that defendant Jerry Beller was to receive $100,000 of the $300,000 loan proceeds from Robert Coffman for allowing defendant Robert Coffman to use the stock certificate as collateral.

14. It was part of the scheme that defendant Thresher "Thomas" Rippey falsely represented that a family member and potential heir of the Firestone Tire and Rubber Company fortune, was active in FDC matters as a director and advisor even though he knew that said family member was found to be an incapacitated person on January 29, 1987 by a probate court in Dallas, Texas and was placed under the care of a guardian. In addition, defendant Thresher "Thomas" Rippey falsely stated to Smith Barney that FDC was in three primary businesses including telecommunications, convenience stores and income-producing commercial real estate.

15. It was part of the scheme that individuals known to the grand jury, including defendant Jerry Beller,

bribed Michael Matonis, an employee of Barrett & Day, a market maker in FDC stock in New York, New York for the purpose of having FDC stock listed in the "pink sheets" and for falsely pretending and representing that FDC stock was an actively traded stock and for quoting predetermined bid and ask prices on the FDC stock as if the stock was being actively traded.

16. It was part of the scheme that defendants William Stoller, Robert Coffman, Richard Lansing, Thresher "Thomas" Rippey, and Jerry Beller attempted to offer the 100,000 shares of FDC to Smith Barney as being worth one million dollars as collateral for the $300,000 loan although they knew and had reason to know the stock was virtually worthless.

17. It was part of the scheme that William Stoller, Robert Coffman, Richard Lansing, Thresher "Thomas" Rippey, and Jerry Beller falsely represented that if the proposed $300,000 loan transaction went through, there would be up to thirty million dollars worth of FDC stock available for future transactions with Smith Barney.

18. It was part of the scheme that defendants William Stoller, Robert Coffman, Richard Lansing, Thresher "Thomas" Rippey, and Jerry Beller did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden the purposes of acts done in furtherance of the scheme.

19. On or about March 7, 1989, at Rosemont, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, for the purpose of executing the above-described scheme, caused to be transmitted by means of wire and radio communication in interstate commerce, certain signs, signals and sounds, namely the facsimile transmission of a balance sheet of FDC contained in Moody's OTC Industrial Report from Robert Coffman in Oklahoma to William Stoller in Chicago, Illinois through the Hyatt Regency business Center in Rosemont, Illinois;

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWO

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Paragraphs one through eighteen of Count One of the indictment are realleged and incorporated herein as if fully set forth.

2. On or about March 7, 1989, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, for the purpose of executing the above-described scheme, caused to be transmitted by means of wire and radio communication in interstate commerce, certain signs, signals and sounds, namely the facsimile transmission of a "Funding Commitment" on the Thousand Oaks project and stock quotation prices on FDC and Bass International Stock from Richard Lansing in Dallas to William Stoller in Chicago, Illinois;

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT THREE

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Paragraphs one through eighteen of Count One of the indictment are realleged and incorporated herein as if fully set forth.

2. On or about March 19, 1989, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, for the purpose of executing the above-described scheme, caused to be transmitted by means of wire and radio communication in interstate commerce, certain signs, signals and sounds, namely a

telephone call between defendant William Stoller in Chicago, Illinois and Richard Lansing in Dallas, Texas;

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT FOUR

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Paragraphs one through eighteen of Count One of the indictment are realleged and incorporated herein as if fully set forth.

2. On or about March 21, 1989, at Rosemont, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, for the purpose of executing the above-described scheme, caused to be transmitted by means of wire and radio communication in interstate commerce, certain signs, signals and sounds, namely the facsimile transmission of a "Fee Agreement" from Robert Coffman in Oklahoma to defendant William Stoller in Chicago, Illinois through the Hyatt Regency Business Center located in Rosemont, Illinois;

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT FIVE

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Paragraphs one through eighteen of Count One of the indictment are realleged and incorporated herein as if fully set forth.

2. On or about March 21, 1989, at Rosemont, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, for the purpose of executing the above-described scheme, caused to be transmitted by means of wire and radio communication in interstate commerce, certain signs, signals and sounds, namely the facsimile transmission of balance sheets of Robert Coffman in Oklahoma to William Stoller in Chicago, through the Hyatt Regency Business Center located in Rosemont, Illinois;

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SIX

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Paragraphs one through eighteen of Count One of the indictment are realleged and incorporated herein as if fully set forth.

2. On or about March 22, 1989, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

WILLIAM STOLLER,
ROBERT COFFMAN,
ROBERT LANSING,
THRESHER "THOMAS" RIPPEY, and
JERRY BELLER,

defendants herein, for the purpose of executing the above-described scheme, caused to be transmitted by means of wire and radio communication in interstate commerce, certain signs, signals and sounds, namely the facsimile call between defendant Thresher "Thomas" Rippey in Chicago, Illinois and defendant Jerry Beller in Dallas, Texas;

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SEVEN

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Paragraphs one through eighteen of Count One of the indictment are realleged and incorporated herein as if fully set forth.

2. On or about June 1, 1990, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JERRY BELLER,

defendant herein, knowingly and willfully made false, fictitious and fraudulent statements and representations of material facts in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, in that defendant Jerry Beller stated and represented during an interview by Special Agents Ronald Hosko and Kevin Rust of the Federal Bureau of Investigation that: he had never had any conversation with Michael Matonis, an employee of Barrett & Day, a market maker in FDC stock in New York, New York, in which he attempted to bribe Matonis, when in truth and fact defendant Jerry Beller had attempted to bribe Matonis in that on November 15, 1989, defendant Jerry Beller told Michael Matonis that he would pay $10,000 (as a bribe) to Matonis if Matonis would list FDC stock in the "pink sheets" so that if anyone would call Matonis looking for FDC stock quotations, Matonis would quote bid and ask prices on the FDC stock as if it were being actively traded. Defendant Jerry Beller went on to tell Matonis in the same conversation that they would "work things the

same way we did last time" and that defendant Jerry Beller would pay the (bribe) money directly to Matonis;

In violation of Title 18, United States Code, section 1001.

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

Instructions Conference pp. 1400-1417

* * *

[p. 1400] MR. THEIS: Actually I have a case which is on the materiality issue.

* * *

[p. 1401] United States versus Bush at 522 F.2d – I only xeroxed one page. The page I had xeroxed is 648. I apologize, I don't know where the place begins.

* * *

It certainly hasn't been overruled. In fact, it is one of the more famous mail fraud cases in the Seventh Circuit.

THE COURT: Hey, they didn't have this case when we went to law school, right? So, therefore, it is new.

* * *

MR. THEIS: But in there they say that misrepresentations are actionable because they are material.

* * *

"Bush's breach of fiduciary duties is important in considering whether he deprived the City of his honest and faithful service. We believe that the [p. 1402] Mayor of the city, most importantly the citizens, were deprived of those services. However, that alone could never be considered a crime under the mail fraud statute. It is only when his failure to provide honest and faithful services

combined his material misrepresentations to the Mayor and John Dupa," * * * and his act of concealment in an illegal fraud occurs which is cognizable under Section 1341."

Then on the same page, on page 648 they say, "Mail fraud, like all other crimes arising out of deceit or deception, requires a specific criminal intent. The mail fraud statute proscribes any scheme utilizing the mails that is, quotes within the case, reasonably calculated to deceive persons of ordinary prudence and comprehension." quotes within the case,

* * *

[p. 1403] THE COURT: Explain to me – maybe I am missing something here, but what actually is your point? I mean what nonmaterial misrepresentation has been alleged by the Government here?

MR. THEIS: The – the case against Coffman is very heavily keyed to his alleged false financial statement. And the evidence showing – and I am not saying – I am not trying to make the argument that Smith Barney was a fool, but the evidence shows that Smith Barney, when it makes one of these loans based on stock, is not doing a credit history. They really don't even care about the guy's creditworthiness because they are going to take that stock as a pledge and liquidate it if he doesn't pay up. So the jury could find that Coffman's statements about his assets are false, but they could find that they are not material because no reasonable person in that context – and reasonableness always applies to a context.

* * *

MR. THEIS: No reasonable person would care what his net worth is.

Now, you know, maybe the Government disagrees with that jury argument, but my point is, of course, that the jury is entitled to be instructed on the law to evaluate the competing arguments as to what is material.

MR. ROSENBLOOM: What he stated is not what the case [p. 1404] stated and – I don't mean this in a deceitful sense at all, but there is a subtle twist here. His instruction focuses on what Smith Barney knew. And the law as to what Smith Barney knew is clear. And that is in the case more recent, 1991, Biasedecki, where the Seventh Circuit [said]

* * *

That those who are gullible as well as those who are skeptical are entitled to protection of the mail fraud statute. The – what was important to Smith Barney is irrelevant.

* * *

[p. 1407] THE COURT: We are working off your – of our instruction number what?

MR. THEIS: No. 3.

Isn't there a real distinction? You know, I don't think that the Government is saying there is anything inaccurate about this instruction. It is not something that I cooked up. As I understand the government's position,

they are saying that there is not even a particle of evidence in the record that would justify giving an instruction on materiality, that materiality has been proven as a matter of law and there is not even a jury issue as to materiality.

THE COURT: No, because that is the standard that they have got to grapple with.

[p. 1408] MR. THEIS: As long as there is some evidence in the record, regardless of how tenuous, to support a requested charge, the charge should be given if it is an accurate statement of the law.

MR. ROSENBLOOM: And it is not. If you look at the third paragraph, it focuses on the – is whether the statement a reasonable person or investor might have considered important in making it. That is a false statement of the law. The statement is whether Coffman reasonably would have believed that that person would have thought it was important.

Smith Barney, what they would have believed, is totally irrelevant.

* * *

If Mr. Coffman – he wants to say Mr. Coffman believed on something – I don't know what it is – that this was unimportant to Smith Barney, that would be the law he would have to prove for the defense. But this is not a correct statement of the law. It just is irrelevant.

* * *

[p. 1409] MR. THEIS: I personally, on this side of the table, have the utmost respect for District Court

rulings, but, in any event, more important, I believe that is the law. The law is that Smith Barney's state of mind is absolutely relevant. The only thing that is relevant is what Mr. Coffman believed Smith Barney thought was material. Now, the issue is in this objective sense what fact would be important, not whether it was subjectively important to Smith Barney, but what would be important to a reasonable person.

* * *

[p. 1413] THE COURT: And so what you are saying, though, is that as long as this whole deal rode on the validity of the stock certificate, anything else anybody said makes no difference whatsoever?

MR. BARNETT: Right.

MR. THEIS: That is absolutely right.

* * *

[p. 1416] THE COURT: ultimately last night when I was reviewing this and your motions, I had to decide what the purpose of the statute was, what kind of behavior was being proscribed, and I feel that it was the kind of behavior that they have shown against Coffman that was being proscribed. And just because it didn't succeed or could not have succeeded with this particular victim doesn't mean it is [p. 1417] not criminal kinds of – that it is not criminal behavior.

So I am going to reject Coffman Instruction No. 3.

* * *

Instructions to Jury pp. 1512-1515

[p. 1512] Title 18, United States Code, Section 1343 provides in part: "Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio or television [p. 1513] communication in interstate commerce any writing, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall violate the federal law."

Each defendant is charged in Counts One through Six of the indictment with wire fraud. To sustain a charge of wire fraud the Government must prove the following propositions as to each count: First, that the defendant knowingly devised or participated in the scheme as described in the indictment to defraud or obtain money or property by means of false pretenses, representations or promises. It is not sufficient to find that the defendant participated in a scheme not specifically alleged in the indictment; second, that for the purpose of carrying out the scheme the defendant transmitted or caused to be transmitted interstate wire or radio communications as charged in the particular count; and, third, that the defendant did so knowingly and with the intent to defraud.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of that count.

* * *

[p. 1514] A scheme means some plan or course of action intended to deceive another person and to deprive another person of something of value by means of false pretenses, representations or promises. Although it is not necessary that the Government prove all of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme, it is essential that one or more of them be proved beyond a reasonable doubt and that those proved beyond a reasonable doubt establish the existence of the scheme to defraud.

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the victim, either to cause the loss of money or property to the victim or to cause financial gain to the defendant.

* * *

[p. 1515] Whether or not the defendant had the specific criminal intent to defraud is governed by the conduct and state of mind of the schemer rather than the objects of the scheme.

* * *

Supreme Court, U.S.
FILED
MAR 5 1997
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(2)

Nos. 96-986 and 96-7338

In the Supreme Court of the United States

OCTOBER TERM, 1996

JERRY BELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT COFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
MARK M RICHARD
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTIONS PRESENTED

1. Whether, in petitioners' prosecution for wire fraud, 18 U.S.C. 1343, the trial court correctly rejected petitioners' proffered instruction on materiality.

2. If materiality were an element of the offense of wire fraud, whether the trial court's failure to instruct separately on materiality was harmless error.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 94 F.3d 330.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1996. A petition for rehearing was

[1] "Pet. App." refers to the appendix to the petition in No. 96-986.

denied on September 19, 1996. Pet. App. 18a. The petition for a writ of certiorari in No. 96-986 was filed on December 18, 1996. The petition for a writ of certiorari in No. 96-7338 was filed on December 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on six counts of wire fraud, in violation of 18 U.S.C. 1343 and 2.[2] Petitioner Beller was sentenced to 18 months' imprisonment, to be followed by three years' supervised release, and petitioner Coffman was sentenced to 13 months' imprisonment, also to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-16a.

1. The evidence at trial showed that petitioners, along with co-defendants William Stoller, Robert Lansing, and Thresher Rippey, attempted to defraud the Smith Barney brokerage house in Chicago, by inducing Smith Barney to advance a $300,000 loan on worthless stock. On May 8, 1989, Stoller telephoned Smith Barney's Chicago office and spoke to Thomas McCausland, the broker of the day. Stoller said he wanted to sell several million dollars worth of stock, including restricted stock of the Firestone Development Company (FDC). Because it was unusual

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[2] Petitioner Beller also was convicted on one count of making a false statement to the FBI, in violation of 18 U.S.C. 1001. After trial and this Court's decision in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), Beller's Section 1001 conviction was dismissed on the government's motion. Co-defendants William Stoller and Robert Lansing pleaded guilty before trial.

for someone to offer to sell that amount of stock to whoever answered the telephone at a brokerage, McCausland sensed that something was awry. In addition, McCausland knew that restricted stock, which he took to mean stock that could not be sold until a future date stated on the stock certificate, is usually sold to corporate insiders, and Stoller had not indicated that he occupied such a position. Accordingly, McCausland reported his suspicions to superiors, who in turn contacted the FBI. Thereafter, an agent posed as a Smith Barney employee in meetings with the defendants. Pet. App. 2a.

The next day, May 9, Stoller met with McCausland and represented that he controlled a pool of assets that included $30 million worth of FDC stock. Petitioner Beller had created FDC in 1987. Although it never had any value, through the years Beller had falsely represented that FDC was worth tens and, at times, hundreds of millions of dollars. He also had misrepresented that a member of the Firestone tire family was chairman of the board. Pet. App. 2a.

Stoller offered to put up $1 million worth of restricted FDC stock as collateral for a $300,000 loan. According to Stoller, the stock restriction would expire in about six weeks. Stoller presented a written statement from petitioner Coffman, dated March 7, 1989, saying that FDC had $35 million in assets. Coffman was to be the borrower, with Stoller getting a $100,000 fee as broker of the loan. Stoller also provided phony balance sheets for Coffman and the company for which Coffman was borrowing the money. According to those balance sheets, Coffman had a net worth of $76 million and his company a net worth of $266 million. In reality, neither Coffman nor his firm had any assets. Pet. App. 2a-3a.

On May 22, 1989, McCausland and the undercover FBI agent met with Stoller, Coffman, and the other defendants, except for Beller, who participated in the meeting by telephone. The meeting ostensibly was to finalize the $300,000 loan, but the defendants made overtures for future loans. Rippey misrepresented that FDC was active in the telecommunications, real estate, and convenience store markets, when in fact it was an empty shell. He also said that, after the $300,000 loan was completed, there would be another $30 million in FDC stock to collateralize future loans. Coffman falsely said that the $300,000 loan was to be seed money for an ambitious project. When the time came to disburse the loan proceeds, FBI agents arrested the defendants who were present; Beller was arrested later. Pet. App. 3a.

2. At trial, petitioners requested the trial court to instruct the jury that, to find petitioners guilty, the jury had to find that the misrepresentations were material. The district court denied that request.[3] Petitioners renewed that claim on appeal, arguing that this Court's decision in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), required such an instruction to the jury on materiality.

The court of appeals rejected petitioners' contention. The court of appeals reasoned that the false statements statute, 18 U.S.C. 1001, at issue in *Gaud-*

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[3] Petitioners' proposed instruction read, in pertinent part:

> The false or fraudulent representations (or failure to disclose) must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

See Coffman C.A. Br. App. 32a; Gov't C.A. Br. 32.

in, did not otherwise contain a "hint of materiality, so * * * the jury has to be instructed separately on that element." Pet. App. 9a. The term "fraud," however, according to the court, "embodies the concept of materiality. Fraud is a *material* misrepresentation or omission, in the sense of one relevant to the decision that the perpetrator of the fraud wants his intended victim to make." *Ibid.* Consequently, in the court's view, an instruction in the language of the statute adequately informs the jury of the materiality requirement. *Id.* at 9a-10a. Finally, the court found that, even if such an instruction were required, the failure to give it here was harmless in light of the overwhelming evidence of materiality. *Id.* at 10a.

ARGUMENT

Petitioners contend (96-986 Pet. 3-12; 96-7338 Pet. 10-18) that materiality is an element of the wire fraud statute, 18 U.S.C. 1343, and that the court of appeals erred in holding that it was not necessary to instruct the jury that it had to find that petitioners' misrepresentations were material. Contrary to petitioners' claim, materiality is not an element of the offense of wire fraud, and the district court correctly declined to instruct the jury on that concept. Further, even if materiality were an element of the offense of wire fraud, petitioners' formulation of that element is erroneous. Any error in failing to give a materiality instruction was, moreover, harmless. Accordingly, further review of petitioners' contention is not warranted.

1. This Court has made clear that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."

Staples v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Hence, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Courts may not alter the legislative definition of a criminal offense by adding elements that have no basis in the statutory text. See *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994) (rejecting court-imposed overt act requirement under 21 U.S.C. 846, which contains no such requirement); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256-269 (1994) (rejecting argument that RICO statute includes a requirement that the racketeering enterprise have an "underlying economic motive"). This Court recently applied that principle in *United States* v. *Wells*, No. 95-1228 (Feb. 26, 1997), in holding that 18 U.S.C. 1014, which does not use the term "material" in prohibiting false statements to banks, does not include materiality as an element of that offense. That same conclusion applies to the wire fraud statute, which also has no express materiality requirement.

Petitioners rely chiefly on *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), for their contention that the wire fraud statute requires proof of materiality, which they have described as proof that the deception "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." Çoffman C.A. Br. App. 32a; Gov't C.A. Br. 32. In *Gaudin*, the Court held that materiality, like other elements of a criminal offense, must be submitted to a jury in a prosecution brought under 18 U.S.C. 1001,

which prohibits false statements in a matter within the jurisdiction of a federal agency. 115 S. Ct. at 2314-2315. Section 1001, however, refers expressly to materiality. The first clause of Section 1001 punishes anyone who "knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a *material fact*, or makes any false, fictitious or fraudulent statements or representations" (emphasis added). Although the prohibition in the second clause of Section 1001 against "false, fictitious or fraudulent statements" is not followed by an express reference to material facts, the context of the statute suggests that the element of materiality is included in all offenses condemned by Section 1001, and the government has not argued otherwise. See *Gaudin*, 115 S. Ct. at 2313 (noting that this point was uncontested).

By contrast, Section 1343 imposes criminal penalties on anyone who devises a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The statute requires proof that the defendant devised or participated in a scheme to defraud, that the defendant acted with intent to defraud, and that, in advancing the scheme, the defendant used some form of wire or electronic communication. See *United States* v. *Clevenger*, 733 F.2d 1356, 1358 (9th Cir. 1984); *United States* v. *Lemire*, 720 F.2d 1327, 1334-1335 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The text of Section 1343 includes no express materiality requirement. The absence of such an explicit materiality requirement in Section 1343 there-

fore "speaks volumes" about Congress's intent to omit such a requirement. *Shabani*, 115 S. Ct. at 385.[4]

2. Even if materiality were an element of the wire fraud offense, petitioners err in arguing that it would require proof that the fraud would have influenced a "reasonable and prudent person in relying upon the representation or statement." Coffman C.A. Br. App. 32a; see note 3, *supra*. That formulation is quite different from the definition of materiality set forth in *Gaudin* and other cases on which *Gaudin* relied, including *Kungys* v. *United States*, 485 U.S. 759

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[4] The court of appeals in this case stated (Pet. App. 10a) that the Ninth Circuit held materiality to be an element of mail fraud in *United States* v. *Halbert*, 640 F.2d 1000 (1981). In *Halbert*, the Ninth Circuit stated that a requirement of materiality "should apply to the misrepresentations which form the basis for a mail fraud violation," but held that the failure to give a materiality instruction was harmless error in light of the overwhelming evidence of materiality. *Id.* at 1008. The court reversed the mail fraud convictions on other grounds. *Id.* at 1006-1007. On a subsequent appeal after the retrial, the Ninth Circuit rejected a challenge to the materiality instruction given by the trial court. *United States* v. *Halbert*, 712 F.2d 388, 390 (1983), cert. denied, 465 U.S. 1005 (1984). The Ninth Circuit also recently rejected a plain-error challenge to a trial court's formulation of a materiality instruction in a mail fraud case. *United States* v. *Carpenter*, 95 F.3d 773, 776-777 (1996), cert. denied, No. 96-7615 (Feb. 24, 1997). The Ninth Circuit concluded that the trial court had in fact told the jury that it was to decide whether the misrepresentations related to a material fact, which the trial court defined as one that "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." *Id.* at 776. We are not aware of any decision in which the Ninth Circuit has reversed a mail fraud conviction because of the failure to instruct the jury that materiality was an element of the offense for the jury's consideration.

(1988). In *Gaudin*, the Court noted that, in a Section 1001 prosecution, the government must prove that the false statement had a "natural tendency to influence, or [be] capable of influencing, the decision of the [institution] to which it was addressed." 115 S. Ct. at 2313; see *Kungys*, 485 U.S. at 770. The Court did not suggest that the government must prove that the affected institution would have been "reasonable" or "prudent" in relying on the false statement.[5]

For their formulation of materiality, petitioners have relied on statements in mail and wire fraud cases that the fraud must be "reasonably calculated to deceive persons of ordinary prudence and comprehension." See 96-986 Pet. 6-7; Pet. App. 33a. As the court of appeals explained (Pet. App. 6a-7a), however, that language in the case law is generally intended to refer not to materiality but to an entirely different point, namely the *intent* of the defendant to deceive his victims:

> The "reasonable person" language has two purposes, neither of which has anything to do with declaring open season on the people most likely to be targets of fraud. The first is to guide the jury in evaluating circumstantial evidence of fraudulent intent: that the defendants' scheme was calculated to deceive a person of ordinary pru-

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[5] Petitioner Coffman acknowledges (96-7338 Pet. 17) that materiality in this Court's decisions refers only to a "natural tendency to influence * * * the decision of the decision making body to which it was addressed." His proffered jury instruction, however, requested the trial court to define a material fact for the jury as a fact that "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." See Coffman C.A. Br. App. 32a.

> dence is some evidence that it was intended to deceive. Evidence that the scheme could fool only an idiot would not be evidence of such intent—would be, if anything, evidence against an inference of such intent—unless the scheme was aimed at an idiot.

Id. at 7a (citation omitted).[6] The court of appeals' conclusion on that point is consistent with the position of most other courts of appeals, which have concluded that "[t]he focus of the language defining a scheme to defraud [as one reasonably calculated to deceive persons of ordinary prudence] is on the violator, not the victim. The definition provides the fact-finder with a standard for determining from the accused's actions whether the accused possessed the requisite mens rea from his actions." *United States* v. *Drake*, 932 F.2d 861, 864 (10th Cir. 1991); see *United States* v. *Green*, 745 F.2d 1205, 1207 (9th Cir.), cert. denied, 474 U.S. 925 (1985); *United States* v. *Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995). But cf. *United States* v. *Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (concluding that government must prove in a mail fraud prosecution that "a reasonable person would have acted on the representations," but not analyzing the issue as one of materiality).[7]

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[6] The court of appeals in this case also noted that the case law language relied on by petitioners also "gestures, although clumsily, toward the indistinct border zone between real fraud and sharp dealing," or "puffing." Pet. App. 7a. But as the court also noted, "[petitioners'] argument is not that they were just puffing, but that their misrepresentations were so gross as to be unbelievable." *Id.* at 8a.

[7] In *United States* v. *Brown*, the Eleventh Circuit held that the evidence was insufficient to show that a prudent person, acting reasonably, would have relied on the misrepre-

Petitioners' formulation of materiality would inappropriately shift the focus of mail and wire fraud prosecutions from the accused to the victim. It would, in effect, put the victim on trial by forcing the government to prove that the victim (or, as here, the intended victim) would have acted reasonably in falling prey to a misrepresenter's blandishments. Such a rule would be inconsistent with the purpose of the mail and wire fraud statutes, which protect the gullible as well as the skeptical. A rule requiring proof beyond a reasonable doubt that the fraud have been capable in fact of deceiving a *reasonable* victim "would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals and hence the people most needful of the law's protection." Pet. App. 6a; see also *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990); *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.), cert. denied, 446 U.S. 919 (1980);

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sentations attributable to the defendants, and the court therefore reversed the defendants' mail fraud convictions. In our view, the reasoning and result in *Brown* are incorrect. Moreover, to the extent that the Eleventh Circuit relied in *Brown* on the language in the case law defining a scheme to defraud as one "reasonably calculated to deceive persons of ordinary prudence and comprehension," 79 F.3d at 1557, its analysis indicates that that language affords a defense to which the defendant is not entitled, *i.e.*, that the victim of a fraudulent scheme must act like a reasonable person. See *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (rejecting the view that "no fraudulent scheme [could] exist[] because no reasonable person would have believed [the] misrepresentations"). Thus, even if materiality were an element of wire fraud, the language requested by petitioners should not be used to define it.

United States v. *Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980).

3. Finally, review is not warranted in this case because the court of appeals correctly ruled that, in any event, any error in failing to instruct the jury on materiality was harmless beyond a reasonable doubt. The evidence of materiality was "overwhelming," Pet. App. 10a, and no rational jury that found that petitioners made the misrepresentations charged as part of the fraudulent scheme could have failed to find that those misrepresentations were material to Smith Barney's decision whether to extend a loan. Petitioners' misrepresentations substantially inflated the financial worth of the borrower (Coffman) and the collateral (the stock of FDC). Those misrepresentations were capable of influencing Smith Barney's decisions, for (as the court of appeals noted, *id.* at 4a) such misrepresentations go to the heart of an institution's decisions whether to advance a loan. It is no defense that the intended victim in this case was too smart to be taken in, for had McCausland not been "unusually alert, * * * the scheme might have succeeded." *Id.* at 5a.

Petitioner Beller argues (96-986 Pet. 5) that the failure to instruct the jury on the element of materiality constitutes a "structural" defect that can never be harmless error. There may be some disagreement among the courts of appeals as to whether a trial court's failure to instruct the jury on the element of materiality can be harmless error. Compare *United States* v. *Wiles*, 102 F.3d 1043, 1060-1061 (1996) (en banc), on reh'g, No. 94-1592, 1997 WL 61512 (10th Cir. Feb. 14, 1997) with, *e.g.*, *United States* v. *De Castro*, No. 95-4648, 1997 WL 20471, at *5-*6 (11th Cir. Feb. 5, 1997) (to be reported at 104 F.3d 1289). Even if

that issue were the subject of a ripe conflict, however, this case does not present a suitable vehicle for resolution of the issue. In the typical case in which materiality is contested, the defendant claims that the alleged misrepresentation is irrelevant to the decisionmaker, or is so trivial as to be beneath notice. In this case, by contrast, petitioners have contended that their misrepresentations were so extreme that "[a] sophisticated financial enterprise like Smith-Barney * * * would hardly regard [them] as an inducement to transact." 96-986 Pet. 6. There can be no serious doubt, however, that petitioners' misrepresentations about the assets of the borrower and the value of their collateral were "capable of influencing[] the decision" (*Gaudin*, 115 S. Ct. at 2313) of Smith Barney to advance them a loan on the restricted FDC stock.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
MARK M RICHARD
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

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